IN THE

Supreme Court of the United States

October Term, 1966

No. 563

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NATIONAL SCREEN SERVICE CORPORATION,
Petitioner

v.

THE POSTER EXCHANGE, INC.,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

FRANCIS T. ANDERSON
Attorney for Respondent

1103 Alfred Avenue
Yeadon, Pa. 19050

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 19104

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QUESTIONS PRESENTED

1. Whether the court of appeals abused its discretion in holding that in view of the facts so far established this case should not be summarily dismissed but should be tried on the merits.

2. Whether the petition filed is so lacking in merit that damages for delay should be adjudged respondent pursuant to Rule 56(4) of this Court.

ARGUMENT

Respondent contends that the petition filed in the case is out of order in several respects; that it is rationally impossible to suppose that it was filed for any purpose other than delay, and that, therefore, damages should be awarded to respondent in accordance with Rule 56(4) of this Court.

All that the court below decided is that this case should not be dismissed summarily but should go to trial to a jury on the merits.

Petitioner contends not only that the court erred, but erred so grievously that this Court should regard the case as an opportunity to ". . . Exercise . . . its supervisory control over the lower Federal Courts . . ." (p. 15, bottom) on the theory that the court below failed in its duty to protect respondent from being ". . . victimized by attorneys who hope to coerce settlements made by defendants unwillingly (sic) to incur the very substantial cost of defending these actions . . ." (p. 14-15).

There is nothing on the record to show that settlement has ever been mentioned in this case, and there is no truth in petitioner's statement, or in its implications. What respondent seeks to do is not to settle the case but to force petitioner to tell its story to a jury—which is something that has never yet been done.

Respondent will endeavor to enumerate and argue as briefly as possible the many other faults embodied in the petition.

I.

The petition violates Rule 23(e) which calls for:

> "A concise statement of the case containing the facts material to the consideration of the questions presented."

In the court below the facts were presented by respondent (appellant below) in the form of an appendix

(or "Duplicated Record") consisting of findings of fact made by the district court on October 17, 1961, in connection with the plaintiff's (respondent's) motion for a preliminary injunction and defendant's (petitioner's) first motion for summary judgment. These findings of fact were based on the pleadings, affidavits, and depositions taken on oral examination. Petitioner has filed in this Court a certified copy of these findings in accordance with Rule 21(3), but no additional copies have been filed, as is authorized by Rule 21(4). A summary of these findings, in fourteen numbered paragraphs, follows:*

1. Respondent is engaged in the business of servicing motion picture exhibitors with supplies of advertising posters, known as "standard accessories" on a rental basis (Finding 1, R.** 2).

2. Respondent's business is limited to the motion picture district of Atlanta, Georgia, which covers the four states of Georgia, Alabama, Florida and Tennessee (id.).

3. Respondent began doing business in 1941 (id.).

4. Petitioner is engaged in the same business as respondent, but on a national scale, and it therefore competes with respondent in the Atlanta area (Finding 2, R. 2).

5. Advertising accessories were originally produced and distributed solely by the film companies themselves (Finding 5, R. 4).

6. As of the time when respondent began doing business, in 1941, it was the practice of all the major film companies to offer standard accessories for sale at their

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* These findings were affirmed, in substance and effect, in the opinion rendered by the court below on the first appeal in this case: *National Screen Service Corp. v. The Poster Exchange, Inc.*, 305 F. 2d 647, Cir. 5, 1962, and they may be found reported at *Poster Exchange, Inc. v. National Screen Service Corp.*, 198 F. Supp. 557.

** "R" refers to the "Duplicated Record," a certified copy of which has been filed by petitioner, as aforestated.

local, or "branch," exchanges—such as the Atlanta exchange—either directly to exhibitors, or to dealers, known as poster renters, such as respondent and petitioner (Finding 5, R. 4).

7. The said "major" film companies included particularly the nationally known (1) Paramount Film Distributing Corporation ("Paramount"); (2) Twentieth Century Fox Distributing Corporation ("Fox"); (3) United Artists Corporation; (4) Universal Film Exchanges; (5) Warner Bros. Pictures Distributing Corporation ("Warner Bros."); (6) Loew's, Inc. ("M. G. M."); (7) Columbia Pictures Corporation (Finding 4, R. 3).

8. As a result of the foregoing, in the year 1941, respondent and petitioner obtained their supplies by buying them on an equal footing at the Atlanta exchanges of the said major film companies (Finding 5, R. 4).

9. At various times during the period from 1941 to 1947 all of the above named major film companies entered into exclusive license agreements with petitioner whereby petitioner was granted the exclusive right to acquire, reproduce and distribute all of the standard accessories produced or authorized by the said major film companies (Finding 6, R. 4).

10. Upon the execution of each of the above mentioned exclusive license agreements the particular film company licensor involved in the agreement discontinued the practice of distributing standard accessories through its branch exchanges, and began the practice of delivering supplies exclusively to petitioner with the result that it became necessary for respondent to cease dealing in such supplies or to apply to petitioner for the privilege of buying such supplies from it (Finding 6, 7, R. 4).

11. As a result of the foregoing, it had become necessary by the year 1947 for respondent to seek to acquire

all of its supplies of major standard accessories from petitioner or go out of business (Finding 9, R. 5).

12. Originally petitioner granted respondent's request for permission to buy the aforesaid supplies (id.).

13. Petitioner continued to sell to respondent its requirements of supplies of standard accessories until May 16, 1961, at which time it completely discontinued the practice, and has ever since refused to make any such supplies available to respondent on any terms or conditions whatsoever (Findings 16, 17, 18, R. 7-8).

14. Respondent "has monopoly power and control both nationally and within the market area" of the business of distributing advertising accessories (Findings 10 and 20, R. 5).

On the basis of these findings, the district court concluded as a matter of law that (R. 7):

> "5. The plaintiff [respondent] has presented evidence which would authorize a jury to conclude that National Screen is utilizing its monopoly power and control as sole manufacturer and distributor of all standard motion picture accessories with regard to motion picture films distributed by or through the major distributors of motion picture films to exclude a competitor and foreclose competition nationally and in the market area in the distribution of standard motion picture accessories."
>
> "6. The plaintiff [respondent] has presented evidence which would authorize a jury to conclude that National Screen's intent and purpose in refusing to deal with the plaintiff was to eliminate the plaintiff as a competitor and/or foreclose competition in the distribution of standard motion picture accessories of the major film companies in the market area."
>
> "7. Plaintiff [respondent] has presented evidence which would authorize a jury to conclude that National

Screen's refusal to deal with the plaintiff originated not from the exercise of business judgment reasonably related to the furtherance of its own business but rather stemmed from an intent and purpose to extend and maintain its monopoly over the distribution of standard motion picture accessories in the market area."

"8. The plaintiff [respondent] has presented evidence which would authorize a jury to conclude that the elimination of the plaintiff as a competitor of National Screen would give to National Screen 100 per cent control over the distribution in the market area of all standard accessories with regard to films distributed by or through the major distributors . . ."

Clearly, no statement of the facts that the courts below relied on can be found in the petition filed in this case.

II.

Petitioner complains that it has been subjected to an excessive amount of litigation, but the fact is that only one case (the *Lawlor* case) has been tried on the merits, and it was tried to the Court, without a jury, and turned on findings to the effect that the plaintiffs therein had been so plentifully supplied with posters by petitioner that plaintiffs not only suffered no loss but actually profited through their relations with the defendants.

The critical findings of the district court in *Lawlor* (all of which constitute part of the record of this case in the district court, and are referred to by petitioner at page 6) are quoted below:

"73. . . . throughout the period in suit the plaintiff received from National Screen all the standard accessories which they ordered. . . ."

"122. During the period in suit, i.e., from 1943 to 1949, plaintiff's business was progressively more suc-

cessful, with increased gross volume and profits. The gross income from plaintiffs' business went up regularly year to year from 1943 to 1949, and, in fact, plaintiffs' gross doubled during this period. The profits of plaintiffs' business also increased each year between 1943 and 1949."

"128. . . . the prices charged the plaintiffs by National Screen for standard accessories were . . . lower than the prices the plaintiffs had paid the predecessors in the years when the plaintiffs acquired standard accessories directly from the producers."

"138. From 1943 to 1949, the period in suit, the plaintiffs suffered no damage or injury to their business or property as a result of any action of any of the defendants herein complained of by the plaintiffs."

In contrast with the foregoing, the instant suit is based on (1) the admitted fact that the petitioner cut off respondent's access to supplies on May 16, 1961, and (2) the uncontradicted allegation that respondent has been suffering substantial loss.

III.

Petitioner's main contention seems to be that the court below refused to consider itself bound by the opinion and judgment rendered by the district court in the *Vogelstein* case (*Vogelstein v. National Screen Service Corp.*, 204 F. Supp. 591), in which the court entered a summary judgment against the plaintiff.

Apart from the fact that the respondent was not a party in *Vogelstein*, it is clear that the decision therein turned on the point that the plaintiff (Vogelstein) had agreed by a stipulation of counsel to be bound by the outcome of the *Lawlor* case. Specifically, the court said (204 F. Supp. 591, 592):

"In this antitrust action, defendants' motion to dismiss the complaint has presented the Court with the following issue:

"Does a stipulation entered into by the parties on November 4, 1957, during the course of a prior suit and the dismissal of that action in accordance with the terms of the stipulation compel us likewise to dismiss the instant complaint?"

The court then went on to say that the *Lawlor* case and its original *Vogelstein* case were two of a group of seven companion cases pending before the same judge (Kraft, J.) that the *Lawlor* case was first on the list for trial, and that at a pre-trial conference in *Lawlor* the judge (204 F. Supp. at pages 592-93):

". . . suggested that the parties endeavor to reach some agreement which would obviate the necessity to retry in any of the companion cases certain of the issues to be litigated in the Lawlor case.

"On November 4, 1957, these discussions resulted in an agreement between the parties which provided in part:

" 'In the remaining six cases if, by final judgment . . . it is determined in . . . (Lawlor) that no conspiracy or unlawful monopoly existed, that issue shall be determinative of the issue in the remaining six cases.' "

And the court went on to hold (rightly or wrongly) that it was determined in *Lawlor* that no conspiracy or unlawful monopoly existed, and that Vogelstein was bound by that ruling because of his stipulation.

No stipulation is involved in this case, and, therefore, neither *Vogelstein* nor its progenitor, *Lawlor*, has any application here.

As the court below in this case said (362 F. 2d 571, 573):

"With regard to *Vogelstein*, it should be noted that the opinion of the district court (the only opinion written in that case), granting National Screen's motion to dismiss, relied largely upon the *Lawlor* case, which, as noted above, was fully considered by this Court on the first appeal. Moreover, the *Vogelstein* opinion does not cite the Supreme Court cases upon which plaintiff bases its contention that defendant has violated Section 2 of the Sherman Act—cases which, according to this Court, 305 F. 2d 651-52 (and the lower court initially, 198 F. Supp. 561), entitled plaintiff to a trial on the merits."

IV.

Petitioner's contention (page 14, top) that this Court's denial of certiorari in *Vogelstein* constituted a "judicial determination" of the correctness of the decision is contrary to the law, as is shown by the authorities cited in the opinion of the court below (362 F. 2d 571, 574, Pet. App. B, 6a).

V.

At page 4, petitioner asserts that all of the cases which have been brought against petitioner have resulted in "unanimous judicial rejection and dismissal with prejudice—except in this instance"; and at page 10, petitioner asserts that it has always received "judicial vindication".

On the contrary, however, as shown by the petition itself (p. 5n) in a suit instituted by the Government the Court entered a decree, by consent, restraining petitioner in several respects, particularly with respect to any further use of exclusive contracts with the motion picture companies.

As a result of that injunction, no exclusive contracts are now in effect, but the trouble is that petitioner is still reaping the benefits of the original ones because the foundations of its business structure are based on them.

VI.

Petitioner repeatedly claims that it manufactures the poster accessories that it distributes, but the record shows the contrary.

Specifically, the uncontradicted allegation of the Amended Complaint filed in the case (par. 10) is that:

> ". . . At all times involved in this complaint . . . said motion picture distributors have had full control over the designing of and the means and quality of reproduction of all standard accessories, and have always been and still are the copyright owners of all of said standard accessories."

The plain fact is that these advertising posters are made by commercial lithographers, and that petitioner is, like respondent, a mere distributor, or poster renter.

RE DELAY

The judgment of the court below was entered June 20, 1966. No motion for re-hearing was filed. On September 12 respondent filed interrogatories addressed to petitioner. On September 17 the instant petition for certiorari was filed. Petitioner made no application to the court below, or to a Justice of the Court, for a stay. On September 21 petitioner filed objections to respondent's interrogatories, and, incidental thereto, requested the district court to stay proceeding in this case pending action by this Court on the petition for certiorari. Specifically, petitioner said:

> "On September 17, 1966, defendant National Screen filed in the Supreme Court of the United States a Petition for a Writ of Certiorari, seeking a review of the recent determination of the Court of Appeals for the Fifth Circuit (362 F. 2d 571) which reversed the summary judgment granted to National Screen by

this Court. It is respectfully urged that, while such Petition for Certiorari is pending before the Supreme Court, no action should be taken by this Honorable Court on the present motion or on any other pre-trial proceedings herein, since a ruling by the Supreme Court favorable to defendant National Screen would obviate the necessity for any trial."

Up to this time the district court has not acted on petitioner's request for a stay, but no progress has been made in that court, and it appears reasonable to suppose that petitioner's efforts have succeeded in delaying the case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied, and that damages for delay should be adjudged respondent on the basis of Rule 56(4) of the Court.

Respectfully submitted,

FRANCIS T. ANDERSON
Attorney for Respondent

Dated: Yeadon, Pennsylvania
October 13, 1966.